

Senate Bill 433

Hearing before Senate Local Government on February 18, 2009

Testimony of Myra L. Shults, JPIA/MACo

Prior to becoming a consultant for JPIA, I defended counties in land use cases—planning, zoning and subdivisions.

I am here today to talk about Sections 1 through 4 of the bill because I have litigated two Part 1 zoning cases in Park County (Section 1 of the bill), one interim zoning case in Big Horn County (Section 2 of the bill) and one Part 2 zoning case in Park County (Sections 3 and 4 of the bill).

Section 1. Part 1 zoning is citizen-initiated, petitioned zoning. 60% of the freeholders petition the county commissioners to create a zoning district. If it is in the public interest or convenience, the commissioners may do so. Then the planning and zoning commission takes over and plans and regulates the district.

Every Part 1 zoning district with which I am familiar is residential and the people agree to zone themselves to maintain their way of life. Densities and types of uses are addressed in the regulations developed by the planning and zoning commission. Often commercial enterprises are prohibited. Part 1 zoning law contains a protest provision.

Now the proponents of this bill are trying to insert into state law a prohibition against these zoning districts prohibiting an industrial operation in these primarily residential areas.

The prohibition is found on lines 17 through 19 on page 1. Compare this to the language in subsection (2) in Section 4 on page 2, lines 22 through 24. In Part 2, or county "top down" zoning these gravel operations can be prohibited if the property is residential.

Not only was SB 345 designed to make Part 2 zoning more difficult, now there is an attack on citizen-initiated zoning in section 1 of this bill.

Section 2. Section 2 deals with that part of Part 2 zoning which allows interim zoning, which you addressed in SB 345 last week and earlier this week.

Again, this section on lines 7 through 9 on page 2 differs from the language for permanent zoning in Section 4 on lines 22 through 24 on page 2. A county can prohibit an industrial gravel operation in a residential zone if it permanently zones, but it can't do so in an emergency? Even if the local growth policy recommends the area be zoned residential? This section goes too far.

Section 3. Finally Section 3 turns nonconforming use law in Montana and nationally on its ear. The purpose of allowing nonconforming uses is so some existing use, which conflicts with subsequently adopted zoning, can continue for a time. The purpose is to eventually phase out that use.

If Section 3 is not struck, it will give vested rights to an **application**. The Montana Supreme Court has said no right to subdivide vests with an application. It has said no right to a conditional use permit vests with an application. It has said no right to a cyanide heap leach mine vests with an application.

If Section 3 is adopted we will see a rush to DEQ with all sorts of open cut application, good or bad, to "vest" the rights to mine before the permanent zoning goes into effect. And we will see subdividers claim they are not being equally protected under this law, asserting if applications for open cut mines are vested and are nonconforming uses, then applications for subdivisions should also be vested.

Please delete Sections 1 through 3 of this bill.

Thank you.